

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION 357, AFL-CIO**

and

Case 28-CC-115255

**DESERT SUN ENTERPRISES LIMITED d/b/a
CONVENTION TECHNICAL SERVICES**

**GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (Board), the General Counsel respectfully submits this opposition to the Motion for Summary Judgment (Motion) filed by Respondent on April 8, 2014. Respondent asserts that, contrary to the allegations in the Complaint, its strike sanction request did not violate the Act under the standard set forth in *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950), and that, in light of the circumstances, it did not engage in unlawful secondary activity. As the pleadings make abundantly clear, there are genuine issues of facts and law that require a hearing before an administrative law judge (ALJ). As such, summary judgment is not appropriate, and the Motion should be denied in its entirety.

I. PROCEDURAL BACKGROUND

Complaint and Notice of Hearing issued in this matter, pursuant to a charge and amended charge filed by Desert Sun Enterprises Limited d/b/a Convention Technical Services, LLC (Charging Party), alleging Respondent violated Section 8(b)(4) of the Act. By

its Answer, filed on February 12, 2014, Respondent denied the Complaint's allegations. By its Motion, Respondent reiterates its denial and in support of its assertions, relies on exhibits, including the deposition transcript of Respondent's agent.

II. ARGUMENT

Summary judgment may be rendered if the pleadings and supporting materials establish that there is no genuine issue requiring a hearing. *Lakeview Convalescent Center*, 307 NLRB 563, 564 (1992). Unless the moving party establishes by admissible evidence that there is "no genuine issue as to any material fact," the burden does not shift to the opposing party to show that there is a genuine issue for hearing. *Lake Charles Memorial Hosp.*, 240 NLRB 1330, 1331 (1979) (citing Fed. R. Civ. P. 56(c)). In a summary judgment proceeding, the pleadings and evidence are viewed in the light most favorable to the nonmoving party. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001); *Petrochem Insulation, Inc.*, 330 NLRB 47, 52 n.20 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001). In addition, the General Counsel is not required to set forth precise facts through affidavits or other documentary evidence to show that a genuine issue for hearing exists. *Kiro, Inc.*, 311 NLRB 745, 746 (1993); *United States Postal Service*, 311 NLRB 254, 254 n. 3 (1993). "[A] simple denial of unlawful conduct is sufficient to raise a material question, without requiring [General Counsel] to come forward with affidavits or other evidence." *Lake Charles Memorial Hospital*, 240 NLRB at 1331 n.3.

A. There Are Genuine Issues of Material Fact that Must Be Decided by an ALJ

1. The Denials in Respondent's Answer Demonstrate Genuine Issues of Material Fact

The Complaint alleges, among other things, that Respondent violated the Act by: engaging in a labor dispute with Charging Party [5(a)]; in support of its dispute with the

Charging Party copied a strike sanction request against Charging Party to the Las Vegas Convention and Visitors Authority (LVCVA) without giving assurances that its picketing would comport with the *Moore Dry Dock* standards [6(a)]; induced or encouraged individuals employed by LVCVA to strike, refuse to handle or work on goods, refuse to perform services, and threatened, coerced, or restrained LVCVA [6(b)]; and that an object of Respondent's conduct was to force LVCVA to cease handling or otherwise dealing in the products or services of, and to cease doing business with, the Charging Party [6(c)].

In its Answer, Respondent denies each of the substantive allegations of the Complaint. As demonstrated by Respondent's denials, these allegations must be heard at a hearing before an ALJ, who can make factual findings based on evidence presented. Genuine issues for hearing exist, and summary judgment is inappropriate.

2. Respondent's Argument is Based on Inadmissible Evidence

Unless the moving party establishes by admissible evidence that there is "no genuine issue as to any material fact," the burden does not shift to the opposing party to show that there is a genuine issue for hearing. *Lake Charles Memorial Hosp.*, 240 NLRB at 1331 (citing Fed. R. Civ. P. 56(c)). Rule 801(c) of the Federal Rules of Evidence states that "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In other words, a document submitted to assert the truth of its written content is hearsay and is inadmissible. *Id.*

In its Motion, Respondent urges the Board to grant summary judgment based on "a review of the totality of the circumstances." Mot. 2:2. Respondent claims that the letter in

question “clearly indicates” that the strike sanction request was lawful and that it is “quite clear” that Respondent had no unlawful objective. Mot. 2-3:25-6. In support of these assertions, Respondent relies on the deposition testimony of its agent. *See* Mot Ex. 1-A. The attached deposition transcript is submitted for the truth of the matters therein, namely that Respondent had only lawful intentions in sending its strike sanction request letter to LVCVA. Therefore, the transcript constitutes inadmissible evidence and cannot be relied upon to show the non-existence of any genuine issue of material fact.

3. The Complaint Establishes the Existence of a Genuine Issue of Material Fact

General Counsel is not required to set forth precise facts through affidavits or other documentary evidence to show that a genuine issue for hearing exists. *KIRO, Inc.*, 311 NLRB at 746. The Board has noted “that it would be impracticable for the Board to follow” a rule similar to FRCP 56(e) – under which a moving party can set forth its version the facts and the other party must either admit or controvert with specific facts – because unlike Federal courts, the Board does not allow prehearing discovery.” *Id.* at 746 n.4.

Respondent argues that the Complaint fails to allege sufficient facts to prove that Respondent engaged in unlawful secondary activity, providing only legal conclusions and no supporting evidence. Respondent argues that the Complaint thereby fails to overcome a presumption that its activity was lawful. As argued below, under Board law, Respondent is not entitled to a presumption that its strike sanction request was lawful. Furthermore, Respondent misapprehends the applicable legal standard. The Complaint is not subject to the requirements Respondent asserts. Rather, the burden is on Respondent to establish the non-existence of any genuine issue of material fact. *Lake Charles Memorial Hosp.*, 240 NLRB at 1331.

B. There are Genuine Issues of Law Concerning the Applicable Legal Standard

In its Answer, Respondent denies, in part, the allegation in paragraph 6(a) of the Complaint by claiming that assurances outlined in *Moore Dry Dock* that any picketing which would occur pursuant to such strike sanctions are not legally required. Respondent incorrectly cites cases from the Ninth Circuit and the D.C. Circuit as controlling.

In *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, the ALJ found that a letter sent by the union to a neutral employer informing it of an ongoing labor dispute with the primary employer who was doing work at the neutral employer's job site was a threat to engage in secondary activity. 346 NLRB 199, 202 (2006), *enf. denied*, 491 F.3d 429 (D.C. Cir. 2007). The ALJ found that because the union did not affirmatively state that picketing would conform to *Moore Dry Dock* standards, the letter was unlawful. *Id.* The Board adopted the ALJ's conclusion. *Id.* at 200. The Board continues to find that statements providing notice to neutral employers must contain assurances that any picketing will not entangle the neutral employer in the labor dispute between the primary employer and the union. See e.g., *id.*; *Iron Workers Local 118 (Tutor-Saliba Corp.)*, 285 NLRB 162, 164-65 (1987); *Food & Commercial Workers Local 506 (Coors Distributing)*, 268 NLRB 475, 477-78 (1983), *enfd.*, 720 F.2d 215 (D.C. Cir. 1983) (unpublished table decision).

Under Board law, Respondent is not excused from unlawful conduct by claiming now that it *would have* complied with *Moore Dry Dock* standards, had picketing taken place. Respondent must provide these affirmative assurances to LVCVA at the time it sent its strike sanction request to the Charging Party. In any case, it is clear that there is a dispute as to the applicable legal standard in this case. As such, summary judgment is not appropriate.

III. CONCLUSION

As Respondent's Motion makes clear, there are a number of significant issues for hearing in the present matter. Respondent denies the substantive allegations in the Complaint and relies on disputed precedent and hearsay evidence. Summary judgment is not appropriate.

Dated at Las Vegas, Nevada, this 14th day of April 2014.

Respectfully submitted,

/s/ *Nathan A. Higley*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT** in INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 357, AFL-CIO, Case 28-CC-115255, was served via E-Gov, E-Filing, and electronic mail, on this 14th day of April 2014, on the following:

Via E-Gov, E-Filing:

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